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**Some selective positions as a guide to the procedural law of the European Union. The intervention of third parties in direct appeals before the judge of the Union**

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**Abstract:** The present investigation aims to shed light on the subject of the procedural law of the European Union. It concerns the intervention, with an exclusive manner, of third parties in the cases, that are introduced through direct appeals and before the judge of the Union by public and private parties. It concerns the presentation of a notion, from the part of the procedural law of the Union, that is based on the ratio and main characteristics of the intervention of third parties in direct appeals. The gaps continue to be many relating to the current criticalities of the discipline under examination. The argument is subject of a complex jurisprudential debate relating to the status of the third party intervener, which admits in the appeal stage the judgment, that he establishes before the court and after the annulment of the referral and of the sentence of first instance. The conclusions arrive at the hypotheses of opening a process in favor of the

private parties, which concern the intervention in the judgment. The use of a broad jurisprudence as well as the relevant doctrine are important keys, which allow to deepen, through a greater analysis, the topic under examination from the procedural point of view of the law of the European Union.

**Keywords:** European Union law; third party intervention; direct causes; CJEU; Court; procedural law of the Union; statute of the CJEU; rules of procedure of the CJEU and/or of the General Court; pilot cases; good administration of justice; Art. 47 CFREU; procedural guarantees.

### **Introduction**

The procedural system seems very complex since its birth from the Court of Justice of the European Union (CJEU). Complex is above all the notion of the presence or not of the process before the judge of the European Union. Its characteristics are distinct from the procedural systems of international organizations as well as from the national systems of its member states. It is a system that reflects the structure of an organization with particular qualifications of potential subjects, that participate in the procedural events, that take place through the judges of the Union, that is of the CJEU, as well as of the General Court.

These are jurisdictional bodies, which compose the needs for the elaboration of a varied and articulated dispute within an international context. It is a system of civil orientation,<sup>1</sup> which guarantees the jurisdictional plan of the interests of various legal subjects to a conception that tends to be unitary in its own rite.

The process at the CJEU involves parties. A process that acquires a quality reserved to the subjects who complete the formalities at an entrance to their judgment.<sup>2</sup> It is noted that they can assume the quality of procedural party, in the capacity of appellant and defendant by the Member States, the Institutions, bodies and organisms of the EU, as well as any natural and legal person including third states. We also refer to situations that third states and legal persons find themselves in the capacity of defendant.

As regards the procedural parties, are distinguished in an abstract manner. They assume a different role in the process before the judge of the Union the public, state and/or institutional parties, which definitively establish the private parties including also public bodies and third states.<sup>3</sup>

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<sup>1</sup>See Art. 272 TFEU.

<sup>2</sup>Tribunal, 16 December 2010, T-259/09, Commission v. Arci New Association Committee of Cagliari and Gessa, ECLI:EU:T:2010:536, not published. 6 June 2019, T-541/17, BEI v. Siria, ECLI:EU:T:2019:393, not published.

<sup>3</sup>CJEU, order of 23 February 1983, joined cases C-91/82 and 200/82, Chris International Foods v. Commission, ECLI:EU:C:1983:45, I-00417. CJEU, 22 June 2021, C-872/19 P, Venezuela v. Council (Affectation d'un État tiers), ECLI:EU:C:2021:507, published in the electronic Reports of the cases, parr. 41-53.

From the point of view of the normative sources, the process of the Union is regulated, providing a definition of the procedural party/parties through the rules of procedure of the General Court, that is, according to Art. 1, par. 2, lett. c), d) of the rules of procedure of the General Court.

Within this precise context the notion of the party and parties are used and indicate, designate each party in the case, including also the interveners. The expressions of the special party/parties show only the cases, that are exclusively applicable to the defendant and/or to both.

These are definitions, that seek to clarify the distinction between the main actors, namely the appellant and the defendant and/or resisting party as well as the supporting actors, namely the principals and third parties, intervening within the scene of a trial before the judge of the Union. It is clear that the rights recognized by the different subjects of the procedural legal relationship diverge in nature and place.

The position that has to do with the role, that is played with the institutional or state parties and with the private ones, seems different.

The differences are of a formal nature and have to do with the membership of different categories, which reflect the discipline of the intervention, as well as the states and institutions, that are

in dispute, in matters of direct appeals, which are promoted before the judge of the European Union. Instead, the private parties have the burden of demonstrating a specific interest, according to Art. 40 of the Statute.

A similar provision cannot be found in the regulation of the CJEU, which governs the process despite the differences, which are connected with the disputes, that are dealt with the jurisdictional bodies of the Union. Thus, only in measures of the contentious judge, even of a contractual nature, the competence is conferred on an arbitration clause, according to Art. 272 TFEU, as well as on the non-contractual liability of the Union for the related damages arising from the institutions and their agents in their functions. That is, on functions based on Art. 268 and 340 TFEU (Kellerbauer, Klamert, Tomkin, 2024).

In other words, the CJEU in the role of judge is called upon to resolve disputes of a constitutional or interinstitutional nature according to appeals, that are brought by Member States and institutions.

This is a distinction between the main actors, including the trial before the CJEU, which takes on a particular characteristic within the scope of the preliminary ruling procedure.<sup>4</sup> The possibility for third parties, who intervene in the trial, is a feature of every procedural system, that provides for and

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<sup>4</sup>Tribunal, 13 September 2018, T-715/14, Rosneft and others v. Council, ECLI:EU:T:2018:544, not published.

regulates the Union principles.<sup>5</sup>

The procedural systems of the founding Member States of the Union offered a variety of choices not very similar to each other but in terms of intervention, which replicated within the procedural system from the period, that the choice of the authors of treaties have not questioned them as a response from the trials, also limiting the intervention of third parties in the cases before the CJEU and in the hypothesis of voluntary adhesive intervention, which depends on the national law, that directly supports the practical logic of the main supporting party (Cadiet, Normand, Amrani Mekki, 2013).<sup>6</sup>

In particular, the decision of a private party, who intervenes in a trial, is based on the knowledge of a pending dispute and formally guarantees the publication in the official gazette, in the registry, of the relevant notice containing information for the registered case.

The intervention of third parties before the Union judge is regulated by a primary rule, according to Art. 40 of the Statute

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<sup>5</sup>CJEU, order 19 February 1960, C-25/59, *Netherlands v. Haute Autorité*, ECLI:EU:C:1960:7, 00787.

<sup>6</sup>Tribunal order of 11 October 2018, T-781/17, *Kraftpojkarna v. Commission*, ECLI:EU:T:2018:704, not published, par. 9; T-782/17, *Wuxi Saijing Solar v. Commission*, ECLI:EU:T:2018:702, not published, par. 8. order of 17 February 2010, T-587/08, *Fresh Del Monte Produce v. Commission*, ECLI:EU:T:2010:42, published in the electronic Reports of the cases, par. 30-32. order of 21 December 2016, C-128/16 P, *Commission v. Spain and others*, ECLI:EU:C:2016:1006, not published, par. 11-14; order of 13 January 2022, T-166/21, *Western Ligurian Sea Port System Authority and others v. Commission*, ECLI:EU:T:2022:10, published in the electronic Reports of the cases, parr. 21-22. order of 23 July 1998, C-155/98 P, *Alexopoulou v. Commission*, ECLI:EU:C:1998:397, I-01179, par. 14-16.

of the CJEU. In particular, it is noted Art. 40 of the Statute of the CJEU, Art. 53, par. 2 of the Statute of the CJEU as well as Art. 30, par. 4, which refers to the adhesive intervention of a dependent nature, affirming “the peculiarities of litigation in the field of intellectual property”.

It refers also to secondary level rules, that is, to provisions, which are relevant with the rules of procedure of the CJEU, through arts. 120-132 and title IV (direct appeals), to the treatment of the intervention and/or of the rules of procedure of the General Court, according to part XIV (arts. 142-145) and title III relating to direct appeals.

The case of clarification of title IV of the rule of procedure of the General Court is not part of the present investigation. It, therefore, provides precise rules for intellectual property cases, i.e. for direct appeals for annulment as well as for decisions of the EUIPO Boards of Appeal in inter partes procedures, which consider disputes between private individuals.

Within this context, the qualified intervention of the interested party allows the appellant, who participated in the administrative procedure of the Board of Appeal, to assume the status of intervener in the proceedings without demonstrating a specific interest, according to the outcome of the case. The qualified intervener assumes procedural rights without adhering to the conclusions of the EUIPO but to the filing of an incidental



appeal, which comes close to the category of an administrative proceeding of the passive joint party (Walicka, 2016).<sup>7</sup>

In this way, the interested party is not allowed to intervene, according to Art. 173 of the rules of procedure of the General Court. It is not excluded, however, his ordinary intervention, according to Art. 40 of the Statute of the CJEU and to Arts. 142 to 145 of the rules of procedure of the General Court.

These interventions are different. This means that the application of the interested party for a proceeding before the commission of a complaint of the ordinary regime is compatible with the relevant dispute for intellectual property rights without constituting the term provided by Art. 179 of the rules of procedure of the General Court.

It is specified that the conditions for the intervention and entry of third parties in a trial before the CJEU and the General Court constitute a discipline, that does not differ from some relative marginal aspects. Consequently, Art. 129 and Art. 142 of the rules of procedure of the General Court are noted, which have as their object the effects of the intervention, which differ substantially from the maintenance of a late intervention, of second rank in a trial before the CJEU.

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<sup>7</sup>Order of 18 September 2019, T-748/18, Glimarpol v. EUIPO-Metar (Outil pneumatique), ECLI:EU:T:2019:321 published in the electronic Reports of the cases, parr. 19 and 20.

In this spirit, Art. 131 and Art. 144 of the rules of procedure of the General Court are considered, relating to the decision on the request for intervention, which are different from the nature of the trials before the CJEU and the General Court.

The intervention of third parties in cases brought through direct appeals has as its objective, that the appeals brought before the CJEU and/or the General Court in the public and private parties obtain the annulment of acts of institutions, bodies, organisms of the Union, also declaring the illegitimacy of the latter obtaining compensation for damage suffered.

The same applies to appeals based on the arbitration clause and to actions for failure to perform against Member States (Luszcz, 2020). The facets are various and inherent to the substantial profiles even after the procedural intervention, in the case before the judge of the Union.

The ratio of the main characteristics of the conformation of the intervention of third parties in direct appeals includes gaps and criticisms of a current discipline of the procedure, as the subject of a complex jurisprudential debate, which the CJEU seems to definitively put the third party in its status and in the appeal stage, i.e. in a judgment instituted after the annulment, with referral of the first instance judgment.

The related conclusions also include the hypothesis of an opening to the process in favor of private parties.

**Main features that currently shape the procedure for intervention in direct appeals**

The only form of intervention before the judge of the Union, except for cases involving intellectual property, is that of voluntary intervention dependent and adhering to the case.

According to Art. 40, par. 4 of the Statute of the CJEU, the conclusions of the request for intervention may have as their object the “adherence, total or partial, to the conclusions of one of the main parties” remaining outside the process that celebrates before the CJEU and/or the General Court the type of action for the jurisdictional bodies that are seized.

Such persistent disputes take the form of intervention *ad adiuvandum* in the case of adhesion to the conclusions of the appellant and/or *ad opponendum* in the case of adhesion, which concerns the conclusions of the defendant.

An intervener presents new arguments, different from those of the party being assisted. He reduces the intervention with a simple manifestation of solidarity, which admits and can modify the perimeter of the dispute, as defined by the conclusions, by the grounds of the main parties, as admissible arguments, which

fall within the framework, which defines conclusions without invoking new grounds, which are distinct and invoked by the appellant.<sup>8</sup>

The procedural system of the Union highlights some hypotheses, which are also common to many internal systems, such as the principal, autonomous, forced, voluntary one on the initiative of the judge.<sup>9</sup>

The jurisprudence clarifies that the judge of the Union cannot resort to a procedural instrument. This happens because the rights of the interested parties are not called into question before the judge and are sufficiently guaranteed by the voluntary intervention, that proposes the opposition to a third party.<sup>10</sup> This is an opposition, a modality that allows a stranger to the principal dispute to enter the scene of a trial before the judge of the Union, as provided for by Art. 42 of the Statute of the CJEU. Similar conditions are provided for and regulated by Art. 157 of the rules of procedure of the CJEU and by Art. 167 of the rules of procedure of the General Court, that is to say Chapter IX and XVII.

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<sup>8</sup>CJEU, 29 July 2019, C-654/17 P, *Bayerische Motoren Werke and Freistaat Sachsen v. Commission*, ECLI:EU:C:2019:634, published in the electronic Reports of the cases, par. 50.

<sup>9</sup>CJEU, 10 December 1969, C-12/69, *Wonnerth v. Commission*, ECLI:EU:C:1969:70, I-00577, par. 5. Tribunal, order of 17 September 2009, T-284/08 TO, *People's Mojahedin Organization of Iran v. Council*, non published ECLI:EU:T:2009:340, I-00161, par.21

<sup>10</sup>Tribunal, 20 March 1991, T-1/90, *Pérez-Mínguez Casariego v. Commission*, ECLI:EU:T:1991:17, I-00143, par. 43.

The hypothesis of intervention allows the third party to participate actively in the pending trial. The opposition of the third party also allows to influence the outcome of the trial after the judge of the Union has decided on merit.<sup>11</sup>

In an adhesive intervention, which is regulated by Art. 34 of the Statute, the opponents of the third parties are different in the relative object and the third opponent for his own reasons modifies the opposing sentence. The intervener, thus, limits himself to the main parts.

The objectives relating to the opposition are different. The third party tries to highlight and find a solution for the “damage” caused to a third party by an opposing sentence. The intervener, in such a way, shows that he has an interest in the solution of a main cause and the third opponent shows that he is harmed by an opposing sentence. The differences of the two parties find a stable point of reference, that is, the preclusion of a third opponent who intervenes in the main cause.

The process before the Union judge has a unitary character and the third parties intervening do not enjoy the same procedural rights by requesting the development of a hearing, which proposes the adoption of measures, which are recognized to the

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<sup>11</sup>CJEU, 12 July 1962, joined cases 42/59-TO and 49/59-TO, *Breedband v. Société des Aciéries du Temple and others*, ECLI:EU:C:1962:24, I-00271.

main parties.<sup>12</sup>

The process before the Union judge, with a unitary manner, raises doubts and favors further research to obtain coherent answers to procedural requests arising in various types of disputes. However, it does not allow the adaptation of the different procedures to the needs and specificities of types of actions, which are proven before the Union judge.

The intervention of third parties and the forms assumed in the case follow a civil process, that is distinguished from the counter-interested parties and co-interested parties of a national administrative process, finding a basis in two similar processes. That is, the appeal for annulment and the direct appeal. The intervener is not legitimized and with an autonomous manner objects the inadmissibility of an appeal.

The intervention is accessory, as a principal cause, and devoid of object since it has been cancelled from its role after the waiver of the acts, the transaction between the main parties and/or when the appeal is declared inadmissible.<sup>13</sup>

The intervener accepts to take on the cause within the state, that is in accordance with his intervention and with the preclusions of the case, excluding the need to repeat procedural acts as a

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<sup>12</sup>Tribunal, 1st June 2022, T-481/17, Fundación Tatiana Pérez de Guzmán el Bueno and SFL v. SRB, ECLI:EU:T:2022:311, par. 112 and 113, published in the electronic Reports of the cases.

<sup>13</sup>Art. 129, parr. 1 and 2, Rules of Procedure of the GC and art. 142, parr. 1 and 2, Rules of Procedure of Tribunal.

consequence of the intervention, thus neutralizing the risk of slowing down his own process.<sup>14</sup>

Opening a process for third parties and within direct appeals responds to the need, that establishes the relative *res judicata* of procedural economy, protecting the legal, procedural position of the parties other than the principals.

The intervention of third parties in the case responds to a double need, i.e. allowing the subject external to the procedural matter to expose the protection of his interests, that are compromised by the conclusions of the case as well as offers the judge of the Union to the principal parties a direct contribution, clarifying, in such a way, the nature of the dispute. It also investigates problems arising from the solution offered by the judges, thus avoiding an unnecessary proliferation of cases.

Disputes in the field of competition, state aid and anti-dumping need to register a greater request for participation of third parties. The intervention of third parties within the perspective of the judge of the Union perceives the reasoning of the process, thus determining a series of possible incidents of a procedural nature, which also have a temporal effect, that is, to increase in a complex way the opportunity for effective jurisdictional protection, which concerns third parties interested in the conclusions of the case and in the integration of the adversarial

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<sup>14</sup>Art. 129, par. 3, Rules of Procedure of the CJEU and art. 142, par. 3, RP Tribunal.

process in a broad sense.

### **What are the categories of interveners?**

As we predicted, the first three paragraphs of Art. 40 of the Statute of the CJEU took into account the categories of interventions that were subject to a specific discipline. According Art. 40 par. 1 of the Statute of the CJEU, the Member States and the institutions of the Union<sup>15</sup> can intervene in the relevant disputes, which are brought before the judge of the Union without any kind of restriction<sup>16</sup>.

According to Art. 40, par. 2 of the Statute of the CJEU a similar right has to do with organs, bodies of the Union and of any other natural and/or legal person (Lasok, 2017),<sup>17</sup> who demonstrates to have as it has been stated “an interest in the resolution of the dispute”. Natural or legal persons cannot intervene in cases between Member States<sup>18</sup> and/or between the institutions of the Union, Member States on the one hand and institutions of the Union on the other hand.<sup>19</sup>

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<sup>15</sup>CJEU, order of 5 September 2018, C-717/17 P(I), *Minority SafePack-one million signatures for diversity in Europe v. Romania and Commission*, ECLI:EU:C:2018:691, published in the electronic Reports of the cases, par. 33.

<sup>16</sup>See Art. 131, par. 2, Rules of Procedure of the GC and Art. 144, par. 4, Rules of Procedure of Tribunal.

<sup>17</sup>CJEU, 11 December 1973, 41/73, 43/73-48/73, 50/73, 111/73, 113/73 and 114/73, *Générale sucrière and others v. Commission*, ECLI:EU:C:1973:151, I-01465, parr. 2-3

<sup>18</sup>Tribunal, order of 7 July 2006, T-319/05, *Switzerland v. Commission*, ECLI:EU:T:2006:195, I-02073, parr. 21-23.

<sup>19</sup>See Art. 131, par. 3, Rules of Procedure of the CJEU and art. 144, par. 5, Rules



According to Art. 40 par. 3 of the Statute of the CJEU the states party to the agreement<sup>20</sup>, which are other than Member States as well as the EFTA Surveillance Authority of the European Free Trade Association provided for by the EEA agreement<sup>21</sup> specify, that they intervene in disputes which are submitted to the CJEU and concern the sectors of application of the agreement.

The intervention also reflects the distinction of legitimacy, which acts according to direct appeals between privileged subjects, i.e. Member States and institutions of the Union.

The intervention is allowed through non-privileged subjects participating in the process, who demonstrate that they have, what has been predicted, i.e. “interest in the resolution of the dispute”. They present themselves as qualified, semi-privileged interveners to the third contracting states of the EEA agreement and the AFTA authority enjoying a presumption, that interests the resolution of disputes, which concern the sectors of application of this agreement.

It is, in this way, in line with general choices, which inspire the jurisdictional system of the Union, the privileged subjects, which confer a broad power of action in the matter of appeals as

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of Procedure of Tribunal.

<sup>20</sup>Agreement on the European Economic Area of 2 May 1992, in OJEU 1994, L 1, p. 3: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:1994:001:FULL&from=EN> Accessed on 05.09.2025.

<sup>21</sup>Art.1, par. 2, lett. b), Rules of Procedure of the CJEU and art. 1, par. 2, lett. h), Rules of Procedure of Tribunal.

well as the interest of legality in the legal system of the Union<sup>22</sup>.

### **Demonstration of interest in resolving the dispute: The role of a non-privileged intervener**

The expression: “interest in the resolution of the dispute”, provided for in Art. 40, par. 2 of the Statute of the CJEU, defines the object of the dispute, i.e. the direct interest in the confidential outcome of the conclusions, as an interest that respects the arguments that come from the parties.<sup>23</sup>

The expression “resolution of the dispute” refers to a more general final decision, which requires and sanctions the operative part of the order and judgment to be issued.<sup>24</sup> The judge should verify whether the applicant is directly affected by the contested act and whether his interest in the resolution of the dispute is certain.

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<sup>22</sup>Art. 56, par. 3 of the Statute.

<sup>23</sup>CJEU, 21 December 2016, C-104/16 P, Council v. Front Polisario, ECLI:EU:C:2016:973, published in the electronic Reports of the cases, par. 10. 10 March 2023, C-611/22 P, Illumina v. Commission, ECLI:EU:C:2023:205, published in the electronic Reports of the cases, par. 6.

<sup>24</sup>CJEU, order 6 October 2015, C-410/15 P(I), Comité d'entreprise de la SNCM v. SNMC and Commission, ECLI:EU:C:2015:669, published in the electronic Reports of the cases, par. 5. order of 5 July 2018, joined cases C-515/17 P and C-561/17 P, Uniwersytet Wrocławski and Poland v. REA, ECLI:EU:C:2018:553, published in the electronic Reports of the cases, par. 7. order of 17 June 1997, joined cases C-151/97 P (I) and C-157/97 P (I), National Power and PowerGen v. Commission, ECLI:EU:C:1997:307, I-03491, par. 53, order of 2 May 2018, C-182/18 R, Comune di Milano v. Council (Siège de l'Agence européenne des médicaments), ECLI:EU:C:2018:307, published in the electronic Reports of the cases, par. 12-13; Tribunal, order of 22 December 2004, T-201/04 R Microsoft v. Commission, ECLI:EU:T:2004:246, I-02947, par. 33-34. 27 November 2013, T-462/12 R, Pilkington Group v. Commission, ECLI:EU:T:2013:119, published in the electronic Reports of the cases, par. 16.

This interest is considered, in a direct and sufficient way, within the limits of the resolution of the case, which is suitable for modifying the legal position of the subject, who requested his intervention.<sup>25</sup> It is an indirect, hypothetical interest that has not considered in a sufficient way the acceptance of the request for intervention.<sup>26</sup>

The legitimacy of the intervention presupposes for various reasons a connection with the dispute, respecting the satisfaction of the conditions, which legitimize to act, according to Art. 263, par. 4 TFEU (Kellerbauer, Klamert, Tomkin, 2024).<sup>27</sup>

The intervention in the case of representative associations, according to the case law, has as its objective the protection of collective interests of their members in the case, raising questions of principle likely to affect the issue, which resolves the dispute, which is capable of modifying the legal position of the association as such.<sup>28</sup>

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<sup>25</sup>CJEU, order of 30 April 2020, C-806/19 P Commission v. HSBC Holdings and others, ECLI:EU:C:2020:364, not published, par. 8.

<sup>26</sup>CJEU, order of 17 February 2015, C-33/14 P, Mory and others v. Commission, ECLI:EU:C:2015:409, published in the electronic Reports of the cases, par. 7. 26 October 2016, joined cases C-596/15 P and C-597/15 P, Bionorica and Diapharm v. Commission, ECLI:EU:C:2016:829, published in the electronic Reports of the cases, par. 7 and 8.

<sup>27</sup>Tribunal, order of 4 February 2004, T-14/00, Coöperatieve Aanen Verkoopvereniging Ulestraten, Schimmert en Hulsberg and others v. Commission, ECLI:EU:T:2004:32, I-00497, par. 19.

<sup>28</sup>CJEU, Order of 17 June 1997, joined cases C-151/97 P(I) and C-157/97 P(I), National Power and PowerGen v. Commission, ECLI:EU:C:1997:307, I-03491, par. 66. 1st October 2019, C-179/19 P, Commission v. Ville de Paris and others, ECLI:EU:C:2019:836, published in the electronic Reports of the cases, par. 7. 1st

For trade associations, intervention in the case is permitted if they are represented by a significant number of subjects active in the sector of interest. They have as their objective the protection of the interests of their members.

The case raises questions of principle relating to the functioning of a sector, that considers the judgment to be issued and to have a considerable impact on the interests of its members<sup>29</sup>.

Opening an intervention in associations has the merit of offering a perspective of collective interest of the represented. It has the objective of allowing an evaluation within the context, which disputes submitted to the judge of the Union arise, thus avoiding individual interventions, which risk altering the rules of the conduct of a process.<sup>30</sup>

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September 2022, C-48/22 P, Google and Alphabet v. Commission, ECLI:EU:C:2022:667, not published, par. 7.

<sup>29</sup>Tribunal, order of 28 May 2004, T-253/03, Akzo Nobel Chemicals and Akros Chemicals v. Commission, I-00479, ECLI:EU:T:2004:164, par. 18. 23 October 2020, T-138/20, PT Ciliandra Perkasa v. Commission, ECLI:EU:T:2020:525, not published, par. 6. 13 July 2022, T-227/21, Illumina v. Commission, ECLI:EU:T:2022:447, published in the electronic Reports of the cases. Order of 10 March 2023, C-611/22 P, Illumina v. Commission, ECLI:EU:C:2023:205, published in the electronic Reports of the cases, parr. 9, 10 and 15-18. Tribunal, order of 16 January 2015, T-189/14, Deza v. ECHA, ECLI:EU:T:2015:63, not published, par. 20. 21 October 2014, T-429/13, Bayer CropScience v. Commission, ECLI:EU:T:2014:920, not published, parr. 76-78. 6 November 2012, T-57/11, Castelnou Energía v. Commission, ECLI:EU:T:2012:582, not published, parr. 13-14. order of 25 March 2015, T-274/13, Emadi v. Council, ECLI:EU:T:2015:202, not published, parr. 8-13. order of 27 October 2020, T-868/19, Nouryon Industrial Chemicals and others v. Commission, ECLI:EU:T:2020:171 non published.

<sup>30</sup>CJEU, Order of 17 June 1997, joined cases C-151/97 P(I) and C-157/97 P(I), National Power and PowerGen v. Commission, ECLI:EU:C:1997:307, I-03497, par. 66; order of 13 January 2022, T-166/21, Western Ligurian Sea Port System Authority and others v. Commission, ECLI:EU:T:2022:10, not published, par. 10.

The situation is different for the European Data Protection Supervisor. His role is carried out within the spirit of the *amicus curiae*. His intervention is based on Art. 58, par. 4 of the Regulation 2018/1725.<sup>31</sup> This means that the supervisor has the power to intervene separately from the main parties before the CJEU and the General Court. An intervention that is included within the limits, that arise from the tasks conferred upon it.<sup>32</sup>

According to the Regulation 2018/1725, the supervision also concerns the processing of personal data for the institutions, bodies of the Union. Furthermore, its consultative role concerns the processing of personal data, i.e. the supervisor who has been admitted to intervene in the cases, which have as their object the direct appeal on inherent matters for its functions and competences.<sup>33</sup>

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<sup>31</sup>Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance.) PE/31/2018/REV/1. OJ L 295, 21.11.2018, p. 39–98

<sup>32</sup>CJEU, order of 17 March 2005, C-318/04, Parliament v. Commission, ECLI:EU:C:2005:190, I-02467, par. 16.

<sup>33</sup>CJEU, order of 8 January 2013, C-288/12, Commission v. Hungary, ECLI:EU:C:2013:4, not published. Order of 12 September 2007, C-73/07, Satakunnan Markkinapörssi and Satamedia, ECLI:EU:C:2007:507, I-07075, par. 10. 19 June 2012, C-307/10, The Chartered Institute of Patent Attorneys, ECLI:EU:C:2012:361, published in the electronic Reports of the cases.

Even if it seems voluntary, the intervention of the guarantor differs from the spirit of Art. 40 of the Statute of the CJEU because it has as its objective a consultative function for the judge of the Union.

### **Actions for failure to fulfil obligations and third party intervention. Direct actions before the CJEU**

A remaining category in the contentious system of the Union are the direct actions before the CJEU.<sup>34</sup> In fact, exclusivity for such types of actions has the CJEU, which is based on Art. 256 TFEU (Kellerbauer, Klamert, Tomkin, 2024) and Art.51 of the Statute, that is, a single level for direct actions originating from institutions of the EU, such as the Council, the European Parliament, the European Council, the European Commission, the ECB, and Member States against the European Parliament and the Council.

As an exception, are the actions, according to Art. 51 of the Statute, that is, from a Member State against the European Commission, which has abstained from the adoption of an act based on Art. 331, par. 1 TFEU (Kellerbauer, Klamert, Tomkin, 2024) in the area of enhanced cooperation.

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<sup>34</sup>CJEU, 16 February 2022, C-156/21, Hungary v. Parliament and Council, ECLI:EU:C:2022:97, published in the electronic Reports of the cases. 16 February 2022, C-157/21, Poland v. Parliament and Council, ECLI:EU:C:2022:98, published in the electronic Reports of the cases.

This is a category, which from a quantitative point of view, the CJEU maintains an exclusive competence for the actions for non-compliance.<sup>35</sup> The Member States intervene in the proceedings, that are initiated against them (Prete, 2017). It is quite rare for the institutions of the Union to intervene and especially for the European Commission within the scope of these actions (Picod, 2009).<sup>36</sup>

The Member States can intervene, as support for the conclusions for the defaulting defendant state at the time of an internal regulation, which is contested by the European Commission in favor of the replacement of the mechanism, that is provided for by Art. 259 TFEU (Kellerbauer, Klamert, Tomkin, 2024), i.e. in a delicate way *ad adiuvandum* and *ad opponendum* when they are interested in accepting or rejecting the case according to a broad interpretation of the provisions of the law of the Union.

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<sup>35</sup>COMMISSION OPINION on the draft amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, presented by the Court of Justice on 26 March 2018. COM/2018/534 final.

<sup>36</sup>CJEU, 15 November 2011, C-539/09, *Commission v. Germany*, ECLI:EU:C:2011:733, I-11235. 22 March 2007, C-437/04, *Commission v. Belgium*, ECLI:EU:C:2007:178, I-02513. 11 October 2016, C-601/14, *Commission v. Italy*, ECLI:EU:C:2016:759, published in the electronic reports of the cases. 5 March 2015, C-502/13, *Commission v. Luxemburg*, ECLI:EU:C:2015:143, published in the electronic Reports of the cases. Order of 17 March 2004, C-176/03, *Commission v. Council*, ECLI:EU:C:2004:158, not published. Order of 25 October 2007, C-155/07, *Parliament v. Council*, ECLI:EU:C:2007:646, not published. Order of 19 June 2007, C-503/06, *Commission v. Italy*, ECLI:EU:C:2007:358, not published. 14 December 2006, joined cases C-485/03 to C-490/03, *Commission v. Spain*, ECLI:EU:C:2006:777, I-11887, par. 22.

Instead, for direct interinstitutional appeals of a constitutional nature, the appeals for failure to fulfil obligations concern disputes between the European Commission and the Member States, according to Art. 258 TFEU and/or between Member States, according to Art. 259 TFEU, which have not admitted the intervention of natural and/or legal persons (Kellerbauer, Klamert, Tomkin, 2024).

The intervention at the CJEU concerns the case which has as its object an action for failure to fulfil obligations for third states, which are contracting parties to the EEA agreement and/or the EFTA Authority.<sup>37</sup>

The possible opening to third parties exist with respect to Member States of the Union and within the case of litigation before the EFTA Court.

The CJEU has had the opportunity to specify and restrict, according to Art. 40, par. 2, the application of these subjects despite the provision of Art. 40, par. 3 of the Statute of the CJEU and without highlighting the exclusion, which is provided for causes, according to par. 2, as an objective, which specifies

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<sup>37</sup>CJEU, order of 15 July 2010, C-493/09, Commission v. Portugal, ECLI:EU:C:2010:444, not published, par. 11. 1st October 2010, C-542/09, Commission v. The Netherlands, ECLI:EU:C:2010:576, not published, par. 5. CJEU, 9 October 2001, C-377/98, Netherlands v. Parliament and Council, ECLI:EU:C:2001:523, parr. 6-11. 13 September 2006, C-295/06, Denmark v. Commission, ECLI:EU:C:2006:556, not published. 10 July 2006, C-14/06, Parliament v. Commission, ECLI:EU:C:2006:452, not published. 20 March 2003, C-3/00, Denmark v. Commission, ECLI:EU:C:2003:167, I-02643.



the circumstances in which the states parties to the EEA Agreement, other than the Member States and the EFTA Surveillance Authority have their own interest in resolving a dispute as regards the fields of application of this type of agreement.<sup>38</sup>

Obviously, the case law, according to Art. 40, par. 3 of the Statute of the CJEU, receives the request for intervention to a third state, as a contracting party to the EEA agreement or the EFTA Surveillance Authority without being subjected to any other different condition other than the subject of the dispute, that is requested to intervene and falls within the scope of application of this type of agreement. In these circumstances, the intervention of subjects as admitted demonstrates that they have an interest in the solution of the dispute<sup>39</sup>.

### **What is the nature of the intervention procedure?**

The participation of third parties in an intervention during a trial at the Court of the Union is long and based on two different phases. The regulatory provisions, for the CJEU and the General Court, in a first phase require the interested party within six weeks of publication in the official journal to notify, inform for the filing of the introductory act of the case, that he intends to

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<sup>38</sup>CJEU, order of 15 July 2010, C-493/09, *Commission v. Portugal*, op. cit., par. 11.

<sup>39</sup>CJEU, order of 18 December 2020, C-328/20, *Commission v. Austria*, ECLI:EU:C:2020:1068, published in the electronic reports of the cases, parr. 8-10.

intervene.

An application that includes a series of information of the case, indicating, also, the conclusions in support of an intervention, which is requested despite the fact that the intervening party is not privileged but cares to expose the requested intervention to the bases of the law that allows such an intervention<sup>40</sup>.

The intervention is of an ancillary nature,<sup>41</sup> meaning that its object is less than the things declared inadmissible in the appeal. In this way, the defendant causes a procedural incident by raising exceptions of incompetence and inadmissibility to a separate act, according to Art. 130, par. 1 of the procedural rules of the General Court.

The decision of the request for intervention, thus remains suspended.<sup>42</sup> This is a request that notifies that the main parties receive observations, which are valid for the confidential nature of certain facts of the case file.<sup>43</sup>

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<sup>40</sup>Art. 130, par. 2, Rules of Procedure of the GC and Art. 143, par. 2, Rules of Procedure of Tribunal.

<sup>41</sup>art. 129, par. 2, Rules of procedure of the GC and art. 142, par. 2, Rules of Procedure of Tribunal.

<sup>42</sup>Art. 144, par. 3, Rules of Procedure of the Tribunal. Art. 144, par. 3, Rules of Procedure of Tribunal. Order of 5 July 2001, C-341/00 P, Conseil national des professions de l'automobile and others v. Commission, ECLI:EU:C:2001:387, I-05263, par. 37

<sup>43</sup>Art. 131, par. 1, Rules of Procedure of the GC and art. 144, parr. 1 and 2, Rules of Procedure of the Tribunal.

The president of the judging panel carries out a check of the cases,<sup>44</sup> as well as the president of the CJEU for the related cases before the same body.<sup>45</sup>

In both cases, the intervention of state or of institutional parties and in absence of requests for confidential treatment gives authorization to the presidential decision.

In other cases, the decision is taken by order according to the acceptance and rejection of the application and the request for confidential treatment of the data contained in one's file.<sup>46</sup>

With the acceptance of the request and the authorization to intervene, the second phase of the intervention procedure opens, allowing the applicant to participate in a process, with the quality of intervener, by filing an intervention brief in which the reasons, arguments *ad adiuvandum* or *ad opponendum*, which accompany any offers of evidence are deduced.<sup>47</sup> Afterwards, the intervener and the main parties sit down to engage in dialogue, respecting the adversarial principle.

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<sup>44</sup>Art. 144, par. 4 e 5, Rule of Procedure of Tribunal.

<sup>45</sup>Art. 131, parr. 2 and 3, Rules of Procedure of the GC.

<sup>46</sup>Art. 131, parr. 3 and 4, Rules of Procedure of the GC and 144, parr. 4 and 5, Rules of Procedure of Tribunal.

<sup>47</sup>Art. 132, par. 1, Rules of Procedure of the GC and Art. 145, par. 1, Rules of Procedure of Tribunal.

### **Confidentiality of the intervener's data as a position that defines the duration of the process**

After the intervention in the case the intervener receives communications regarding the procedural documents, that are notified to the main parties after request by one of them.<sup>48</sup> However, the president decides not to communicate confidential and secret documents (Barents, 2016).<sup>49</sup>

The request for non-communication of a confidential document<sup>50</sup> undoubtedly constitutes an important derogation from the principles of publicity and adversarial proceedings, which is inspired by the dynamics of the process, requiring the judge of the Union to question the interests which are conflicting and potentially legitimate the will of the main party and the protection of private life and business secrecy.<sup>51</sup>

On the other hand, the need for the intervener to have the necessary information and to assert his rights exposes an important thesis in the process. Thus, it is specified that this type

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<sup>48</sup>Art. 184a of the Practice Rules for the implementation of the Rules of Procedure of the General Court of 20 May 2015, in OJ L 152, 18.06.2015, p. 1; See, most recently, the Amendments to the Practice Rules for the implementation of the Rules of Procedure of the General Court of 1 February 2023, in OJ L 73, 14.12.2023, p. 58

<sup>49</sup>Art. 131, parr. 2 and 4, Rules of Procedure of the GC and art. 144, parr. 2, 4, 5 and 7, Rules of Procedure of Tribunal.

<sup>50</sup>See par. 181 Practice Rules for the implementation of the Rules of Procedure of the GC, op. cit.

<sup>51</sup>Tribunal, order of 25 November 2009, T-383/03, Hynix Semiconductor v. Council, ECLI:EU:T:2005:466, not published, parr. 39-40. 22 July 2021, T-671/19, Qualcomm v. Commission, ECLI:EU:C:T:2021:626, non published, par. 32.

of treatment is requested for the intervener only by the main party.<sup>52</sup>

The evaluation, control and screening of the request for confidentiality of information to a document is done in two phases. The first when the validity is appreciated, i.e. the actual relevance for the objectives of the resolution of the dispute and the relative balancing for protection and confidentiality is carried out. In this case, the respect of the procedural rights of the intervener arises.

It is also normal and evident that the request for confidentiality highlights a greater complexity in the management of the interventions as well as generates difficulties, which derive in economic disputes<sup>53</sup> reserved for treatment and not for procedural documents relative to the activity of the registry and in the times of the relative process.<sup>54</sup> However, reasons arise justifying the request for treatment, establishing, thus, in writing the documents that are attached and that must be benefited.<sup>55</sup>

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<sup>52</sup>Art. 144, parr. 2 and 4 and art. 103 of the Rules of Procedure of Tribunal.

<sup>53</sup>Tribunal, 17 September 2007, T-201/04, Microsoft v. Commission, ECLI:EU:T:2007:289, II-03601. 10 November 2021, T-612/17, Google and Alphabet v. Commission (Google Shopping), ECLI:EU:T:2021:763, published in the electronic reports of the cases.

<sup>54</sup>Draft Rules of Procedure of the General Court of 14 March 2014, pp. 144-145: <https://data.consilium.europa.eu/doc/document/ST-16724-2014-INIT/en/pdf> Accessed on 08.09.2025.

<sup>55</sup>Tribunal, order of 11 April 2019, T-612/17, Google and Alphabet v. Commission, ECLI:EU:T:2019:250, not published.

The Court has discretionary power. It limits its assessments to requests, that specify the information, the documents concerned, seeking to motivate in an adequate way<sup>56</sup> their confidential nature.<sup>57</sup>

The obligation of reasoning is assessed according to the nature of the information that each document deals with. It is also distinguished that the information of a secret nature, i.e. for commercial, financial, accounting and/or competition secrets, internal to other documents, is precisely indicated by the applicant.

The absence of appeal allows the court to reject requests for confidential treatment when it appears to be broad and that goes outside the necessary rules<sup>58</sup> concerning data of a public nature that are manifested by the elements of a file that their confidentiality has become through the publication of the contested decision and disclosure of other elements in their file as an outdated manifestation.<sup>59</sup> If the court accepts the request for confidential treatment as well as the related passage of

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<sup>56</sup>Tribunal, Order of 22 February 2005, Hynix Semiconductor v. Council, T-383/03, ECLI:EU:T:2005:57, not published, par. 34.

<sup>57</sup>Tribunal, order of 11 April 2019, T-612/17, Google and Alphabet v. Commission, ECLI:EU:T:2019:250, not published, par. 12.

<sup>58</sup>Tribunal, order of 11 April 2019, T-612/17, Google and Alphabet v. Commission, op. cit., par. 16.

<sup>59</sup>Tribunal, order of 5 October 2020, T-380/17, HeidelbergCement and Schwenk Zement v. Commission, ECLI:EU:T:2020:471, not published, parr. 74-76. Order of 15 September 2016, T-827/14, Deutsche Telekom v. Commission, ECLI:EU:T:2016:545, not published, par. 46.

defense papers, a similar attachment of treatment will be followed in the appeal at the CJEU.<sup>60</sup>

This is a laborious, effective approach that consists in provoking the adoption of measures of organization of the procedure, according to Art. 89 of the rules of procedure of the General Court. It is also contradictory between the parties, justifying the request for a confidential treatment ruled by an order.

Good collaboration for all parties is not impossible given that the presence of divergent interests concern the confidential nature of information, documents, data to authorize the cause in the light of a common and non-confidential version, as a precise impact for the requests for treatment, that reserves the causes of plurality of interveners.<sup>61</sup>

### **Oppositions and asymmetries connected with the discipline of participation of third parties in the process**

The intervention of third parties in direct appeals presents some gaps, oppositions. It is also obvious according to *de iure condendo* a remedy with regard to the evolution of matters, that are the object of the litigation.

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<sup>60</sup>Order of 19 January 2023, C-738/22 P, Google and Alphabet v. Commission, ECLI:EU:C:2023:44, not published, par. 5.

<sup>61</sup>Tribunal, 14 September 2022, T-604/18, Google and Alphabet v. Commission (Google Android), ECLI:EU:T:2022:541, parr. 31-38.

The main issues lead to various reflections. Natural and legal persons, according to Art. 40, par. 2 of the Statute of the CJEU,<sup>62</sup> lay the foundations for a constitutional, institutional litigation. On the other hand, the impossibility of an intervention that arrives late and within the process is a point that creates asymmetries. A third position discussed concerns the provisions of the rule of procedure of the General Court as a closing one that allows it to take into account the limitation of an intervention to the hypothesis of an adhesive and dependent intervention, which reserves the possibility of inviting a third party to intervene in its own process.

### **Impossibility for private parties to intervene in their own institutional dispute**

Although natural and/or legal persons have an interest in resolving a dispute of a constitutional nature, according to Art. 40, par. 2 of the Statute of the CJEU, natural and legal persons are not entitled to intervene.<sup>63</sup> This is a provision that does not substantially distinguish, what is represented in the versions of the statute and finds its reasoning in the public nature of interests, as the object of the dispute and in the difficulty of

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<sup>62</sup>CJEU, Order of 29 July 2019, C-119/19 P, Commission and Council v. Carreras Sequeros and others, ECLI:EU:C:2019:658, not published, par. 6.

<sup>63</sup>CJEU, 6 December 1989, C-147/86 TO2, ECLI:EU:C:1989:611, not published, parr. 17-18.



identifying an interest of a private nature, which intersects with the interests of the states, of the institutions of the Union.

The situation is not the same for the organs, organisms of the Union, which participated in a manner compliant with the law of the Union, in the procedure for the adoption of the contested act. The CJEU has specified that for reasons of economy, Art. 40, par. 2 of the Statute of the CJEU, has not precluded the participation in the process of the contentious type of bodies, organisms, that demonstrate that they have their own interest in the dispute.<sup>64</sup>

This is an exclusivity of the process, that we can call anachronistic and less justified to the system of application of distribution between the CJEU and the General Court, reserving the treatment in the areas of litigation between Member States and institutions.

In this way, a limit is established to the situations, in which the intervention of a private party is appropriate as well as in the litigation in the state aid sector, that has prevented the relative beneficiary of an aid and/or its competitor of a state body and provider from the material point of view to take the procedure against the relative decision of the European Commission and

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<sup>64</sup>CJEU, order of 17 September 2021, joined cases C-6/21 P and C-16/21 P, Germany and Estonia v. Commission, ECLI:EU:C:2021:756, parr. 7 and 8. order of 17 September 2021, C-144/21, Parliament v. Commission, ECLI:EU:C:2021:757, published in general report. Order of 3 March 2022, C-551/21, Commission v. Council, ECLI:EU:C:2022:163. Order of 3 March 2022, T-125/22 R, RT France v. Council, non published, par. 2.

before the CJEU to an appeal. Thus, the procedures that are related to the issue among the things that have to do with the principle of procedural economy are duplicated.

The interest in the resolution of the dispute and in intervening to non-privileged subjects persists in the context of causes that have as their object the non-fulfilment of a Member State, remaining however in the characteristics of the competence of the same CJEU.

Within this spirit, we can note the controversies that territorial bodies carry out, which are endowed with legislative powers and specific competences, taking into account the position that is divergent and contrasting with the state itself.

The procedural events are paradigmatic highlighting their nature in an inconsistent manner in the related litigation on the matter. This is an anomalous situation, that verifies the group of cases on state aid and the so-called pilot cases treated by the General Court as well as the consequences of suspension in all the others.<sup>65</sup>

In this regard, we recall the aid of Spain to the taxation regime, applicable to financial leasing contracts.<sup>66</sup> The General Court,

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<sup>65</sup>CJEU, Conclusions of the Advocate General Szpunar, 14 July 2022, joined cases C-31/22 P(I), C-32/22 P(I) and C-74/22 P(I), *Atlas Copco Airpower and Atlas Copco/Commission, Anheuser-Busch Inbev and Ampar v. Commission and Soudal and Esko-Graphics v. Commission*, ECLI:EU:C:2022:575, published in the electronic Reports of the cases, par. 89.

<sup>66</sup>CJEU, order of 21 December 2016, C-128/16 P, *Commission v. Spain*, ECLI:EU:C:2016:1006, not published.

identified the pilot cases as those introduced by a Member State and by a company. In this regard, Art. 71 of the rules of procedure of the General Court is taken into consideration as a suitable cause for the pending cases to become a pilot ones.

The General Court, in this case, seems to take into account the limits proposed by Art. 40, par. 2 of the Statute, which chooses for each Member State a pilot case by a private party without precluding any intervention from private parties.

The pilot case mechanism<sup>67</sup> is part of a specific operating method without allowing the appellants of the causes that are connected and suspended to intervene in the pilot cases in the time that the application has been presented.

The case law admits the possibility for the subjects to intervene if there is an interest<sup>68</sup> relating to the appeal judgment before the CJEU. When third parties are not able to prove their interest in a direct way in the resolution of a dispute, such an interest is not considered as a simple circumstance for the third appellant to a suspended case, who awaits the outcome of a pilot case. After the rejection of the request to intervene in the appeal stage, the compensation action is based on the outcome of a pilot case.

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<sup>67</sup>CJEU, order of 17 August 2022, C-4/22 P(I), SJM Coordination Center v. Magnetrol International and Commission, ECLI:EU:C:2022:626, published in the electronic Reports of the cases, par. 52. It is now governed by art. 71 bis RP Trib, inserted in the Amendments to the Rules of Procedure of the Court, cited, which came into force on 1 April 2023.

<sup>68</sup>CJEU, order of 10 September 2019, C-597/18 P, Council v. K. Chrysostomides & Co. And others, ECLI:EU:C:2019:740, not published, parr. 19-20.

For example the appeals of Spain and of the first-instance appellants are joined. The appellants and their causes are suspended and have asked to be able to intervene before the CJEU in support of the conclusions of the first-instance appellants. The problem of impossibility of intervening in support of the conclusions of a state is enshrined in Art. 40, par. 2 of the Statute of the CJEU.

The CJEU has specified that a subject requests to be admitted to intervene in the appeal is not deprived of his right to a dispute between an institution and a natural or legal person as well as a case between an institution and a Member State.

The intervention *ad adiuvandum*, against the private party, highlights the inconsistencies of the discipline when state aid and the line of demarcation between the public interest pursued by the state and the private interest is impalpable.<sup>69</sup> Another procedural case that is related to a different context highlights, that in some cases the exclusion in this regard risks causing an effective jurisdictional protection.<sup>70</sup>

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<sup>69</sup>Tribunal, order of 8 March 2018, T-46/18, *Comune di Milano v. Council*, ECLI:EU:T:2018:131, not published, parr. 11-12. order of 11 June 2018, C-182/18, *Comune di Milano v. Council*, op. cit., par. 16.

<sup>70</sup>CJEU, order of 7 June 2022, C-212/22 P(I), *SES Astra v. Commission*, ECLI:EU:C:2022:460, not published, par. 22. order of 16 July 2020, C-883/19 P, *HSBC Holdings and others v. Commission*, ECLI:EU:C:2020:561, not published, par. 21. 28 April 2015, C-456/13 P, *T & L Sugars and Sidul Açúcares v. Commission*, ECLI:EU:C:2015:284, published in the electronic reports of the cases, parr. 43 and 44. order of 7 June 2022, *SES Astra v. Commission*, C-212/22 P(I), ECLI:EU:C:2022:460, not published. order of 4 March 2022, T-489/21, *Spain v.*

The CJEU ruled on the legitimacy of a court order, which is rejected on the basis of Art. 40, par. 2 of the Statute of the CJEU. It concerns an application for intervention in a case between a Member State and the European Commission by a European Citizens' Initiative (ECI) committee, pursuant to Art. 24, par. 1 TFEU.<sup>71</sup>

The Committee was interested in maintaining the decision contested by Romania as well as the European Commission in part of the application for registration. The ECI's proposal showed its interest in the outcome of the dispute and a change in the legal situation.<sup>72</sup>

The Committee during the appeal of the order judged the strict interpretation of the objectives of Art. 40 of the Statute of the CJEU, which noted the relevant provision adopted in a period that a similar right was not foreseen and recognized by European citizens as well as within the framework of the legal system of the Union.

The European Commission agreed on an evolutionary interpretation of the provision, considering that the situation as that of the case in question, that the Member State has brought

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Commission, ECLI:EU:T:2022:132, not published.

<sup>71</sup>Tribunal, 3 February 2017, T-646/13, *Minority SafePack-one million signatures for diversity in Europe v. Commission*, ECLI:EU:T:2017:59, published in the electronic Reports of the cases.

<sup>72</sup>Tribunal, order of 16 November 2017, T-391/17, *Romania v. Commission*, ECLI:EU:T:2017:831, not published, par. 11.

an action for annulment against an act for the institution, has created and contrasted subjective rights in favor of the applicant for intervention.

The literal interpretation of Art. 40, par. 2 of the Statute of the CJEU deprived the applicant of the right to be heard in court. This guarantee was also precluded from Art. 47 CFREU, as well as from the general principles of Union law. This interpretation did not imply an interference of private parties as interveners in cases between Member States and between institutions of the Union, which do not see the former as opposed to the latter.

Within this context, the public parties join the judge of the Union to defend their institutional prerogatives, which express their quality as guardians of the relative respect of the Union and not only. It is an interest in the resolution of the dispute in accordance with Art. 40, par. 2 of the Statute of the CJEU, which constitutes an adequate and effective filter in this regard.<sup>73</sup>

A literal and rigorous interpretation of the provision raises arguments from the parties, that are rejected by the CJEU.<sup>74</sup> It is appropriate the public interest of the Member States that is confused by the private parties, requiring the modification of the statute to harmonize, standardize the relative discipline of

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<sup>73</sup>CJEU, order of 5 September 2018, C-717/17 P(I), *Minority SafePack-one million signatures for diversity in Europe v. Romania and Commission*, ECLI:EU:C:2018:691, not published, par. 9-21.

<sup>74</sup>CJEU, order of 5 September 2018, *Minority SafePack-one million signatures for diversity in Europe v. Romania and Commission*, op. cit., par. 37.

intervention.

### **An impossible late intervention in the trial before the General Court**

With a simplified manner the discipline of the intervention, according to the rules of procedure of 2015 has been abolished, without admitting the intervention in the trial when the application is filed after the expiry of the term of six weeks from the publication in the official gazette and the communication concerning the relative introduction to the appeal.<sup>75</sup>

The exercise of a late intervention is maintained by the rules of procedure of the General Court leaving a margin of discretion to the President with the aim of offering greater freedom to the action of the Member States, according to Art. 40, par. 1 of the Statute of the CJEU. In this way, it intervenes in disputes, that produce situations of an unjustified incompatibility of the rules of procedure.

The filing of the request for a late intervention deprives the intervener of the right to submit briefs provided for by Art. 132, par. 1 of the rules of procedure of the CJEU, leaving however the possibility of submitting observations, through the hearing of discussion, if it is only one. The General Court provides for the

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<sup>75</sup>Tribunal, 16 May 2018, T-612/17, Google and Alphabet v. Commission, ECLI:EU:T:2018:292, not published. Order of 17 August 2022, C-4/22 P(I), SJM Coordination Center v. Magnetrol International and Commission, ECLI:EU:C:2022:626, not published, parr. 22 and 23.

forfeiture of the applicant, who has requested to intervene after the validity of the term of six weeks provided for by the rules of procedure.

The possibility of establishing an oral phase, according to the reservation of the right to submit an application to the main parties, risks excluding their participation in the proceedings.

The extension to a hearing is granted to the second-instance phase where the intervener exercises his rights on the basis of limited documentation. This position seems not to be justified, especially if it concerns similar objections that may have arisen with reference to the proceedings before the CJEU and the hearing report completely suppressed by time.<sup>76</sup>

In particular, this position does not seem similar to that of the late intervener, who before the amendment of the rules of procedure of the General Court, decides with an accelerated procedure, according to Art. 151 of the rules of procedure of the General Court, to limit the participation in the hearing and the arguments that are filed, according to Art. 154, par. 3 of the rules of procedure of the General Court.

The deadline for submitting the application to intervene is based on Art. 79 of the rules of procedure of the General Court. After sixty-five days there is the possibility of opening the oral phase of the procedure despite the delays.

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<sup>76</sup>Tribunal, 27 July 2022, T-125/22, RT France v. Council, ECLI:EU:T:2022:483, not published.



This is a justification, which abolishes the late intervention without asking for a comprehensible logic of maximum simplification, which disposes of and accelerates the process under another different profile, that constitutes an undoubted impairment of the jurisdictional protection of third parties.

This is a measure that limits the strategy of participation in the process in an incisive form that is costly and deprived for the General Court. In other words, this possibility takes on greater understanding through the participation of subjects, that qualify the interested parties to a final decision.

**Closing provision and lack of provision that allows the judge of the Union the possibility of inviting a third party to intervene in the process**

The effects of the abolition of a late intervention, generally offers the General Court particular situations, which include the participation of a third party, who is likely to have an important role in the process foreseen according to the rules of the procedure of Civil Service Tribunal (CST) and of Art. 89, which provided for a hybrid form of invitation to intervene.<sup>77</sup>

This is a procedure, that is used to allow the reopening of the intervention, which depends in a limited way on subjects, who

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<sup>77</sup>CJEU, 26 March 2009, C-113/07 P, *Selex Sistemi Integrati v. Commission*, ECLI:EU:C:2009:191, I-02207, par. 39.

appear to be appropriate for the participation in the process (Bürli, 2017; Pastor Vilanova, 2019).<sup>78</sup>

At the time of accession a new regulation of procedure (2015) has attributed to the court cases in matters of public function at the time that the direct changes incorporate a regulation according to the rules of a dispute having as a consequence the abolition of the CST.<sup>79</sup>

The failure to transfer the rules of procedure of the General Court is analogous to that of the rules of procedure of the PST relating to the invitation to intervene, with a method tested in international jurisdictional contexts. This mechanism appears as a missed opportunity following a dispute of public function on the part of the General Court.

The hypothesis of an insertion also of the rules of procedure does not seem *prima facie* to impose on the judge of the Union an offer of an appropriately used instrument that integrates the adversarial process by instructing questions in the pending case.

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<sup>78</sup>See in particular Art. 44, par. 3, lett. 1) of the Regulation of the ECtHR.

<sup>79</sup>TPF, 5 July 2011, F-46/09, V v. Parliament, ECLI:EU:F:2011:101, not published. The TPF successfully invited the European Data Protection Supervisor to intervene in the case because the appellant complained in this case of a violation of Articles 6 and 7 of the Regulation on the protection of personal data.

### **Procedural status before the General Court admitted to the intervention of appeal proceedings after annulment with referral**

The procedural status of referral before the General Court after the annulment of a decision following an appeal proceeding admits the intervention in the appeal proceedings before the CJEU, which in recent years has been in continuous debate within the court context.

The appeal proceeding before the CJEU, according to Art. 61, par. 1 of the Statute of the CJEU, allows the CJEU to annul in part and/or totally the relevant decision of the Court by referring to the case a new relative decision, for some reasons of the annulment, in the sense that the CJEU once the decision of the Court has been annulled retains the case to decide on the status of the acts that allows.<sup>80</sup>

The referral judgment is contained in articles 215-219 of the rules of procedure of the General Court. These articles provide that the cause, through the referral judgment, respects the law that is bound. The process, thus, activates a basis for a decision of annulment and referral from the CJEU without any form of assumption to the same. The referral judgment, as a principle *ex officio*, and the appeal judgment do not function as a connecting

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<sup>80</sup>CJEU, 16 September 2021, C-337/19 P, *Commission v. Belgium and Magnetrol International*, ECLI:EU:C:2021:741, not published.

element between the phase of the judgment on merit and as a judgment of annulment and referral.

Especially, Art. 217 of the rules of procedure of the General Court regulates the conduct of the referral process, which distinguishes the hypothesis of the decision, that annuls a closing pronouncement in the written phase, regarding the application that was adopted before the closure of this phase.

The parties to the proceedings file their written observations on conclusions, which are drawn from the same decision of the CJEU and the objectives of the resolution of the dispute. In the second case the procedure takes the state it was already before. Art. 17 of the rules of procedure of the General Court highlights the setting of a process before the judge of the Union between main parties.

Nothing is reported for interested third parties, who are not constituted during the first-instance trial and admitted to intervene in the appeal trial before the CJEU to submit written observations and to participate also in the referral trial given the fact, that they took part in the appeal trial.

The rule does not seem to include the hypothesis of participating in the referral process in the hypothesis, that they did not intervene in the first-instance trial.

Such an interpretation clashes with the precise, direct provision that governs the referral proceedings in relation to costs,

according to Art. 219 of the rules of procedure of the General Court. More precisely, it establishes that the General Court provides for the costs of the proceedings instituted before it and of the appeal proceedings before the CJEU.

The formal approach linked to the text of Art. 217 of the rules of procedure leaves no margin of entry into the referral proceedings for the parties intervening in the appeal, which results in a decision by the judge of the Union on costs that are borne by these interveners.

By analogy, articles 142-145 of the rules of procedure regulate the regime of intervention, which does not concern in any way the status recognized to third parties, who are allowed to intervene in an appeal proceeding before the CJEU. This happens in the case, that the latter has declared and founded the appeal annulled by the decision of the General Court, that refers to the case until reaching a ruling. It is normal, that the request for intervention in the referral proceeding before the General Court, presents for the appellant the cause, which was repealed at first instance and has failed to intervene in the appeal proceeding.

Such a request is late, when it is proposed after the expiry of the term provided by Art. 143, par. 1 of the rules of procedure of the General Court. Its application, which appears rigorous, responds to the need for legal certainty as well as the need to avoid

discrimination and arbitrary treatment by the administration of justice without specifically allowing a mechanism of pilot cases, the reinstatement of time without demonstrating the existence of a fortuitous event and/or of an excusable error.<sup>81</sup>

### **The “rhapsodic” position of the General Court**

We can speak of a monologue of a rhapsody that is part of the General Court since many questions concern the procedural status in a context of a referral judgment to the parties, who are allowed to intervene in the appeal judgment before the CJEU. A monologue, that shows a copious jurisprudence of a diversity in various cases, which the General Court recognizes the quality of interveners to those, who have purchased in the appeal stage the participation in a referral judgment without contesting the main parties.<sup>82</sup>

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<sup>81</sup>CJEU, order of 17 August 2022, C-4/22 P(I), SJM Coordination Center v. Magnetrol International and Commission, ECLI:EU:C:2022:626, parr. 33-45 and 66.

<sup>82</sup>Tribunal, 23 March 1993, T-43/89 RV, Gill v. Commission, ECLI:EU:T:1993:24, II-00303. 23 September 2020, joined cases T-515/13 RENV and T-719/13 RENV, Spain and others v. Commission, ECLI:EU:T:2020:434, published in the electronic Reports of the cases, parr. 62-66. 24 September 2019, T-586/14 RENV, Xinyi PV Products (Anhui) Holdings v. Commission, ECLI:EU:T:2019:668, published in the electronic Reports of the cases. 14 December 2018, T-400/10 RENV, Hamas v. Council, ECLI:EU:T:2018:966, published in the electronic Reports of the cases, par. 97. 21 November 2018, T-545/11 RENV, Stichting Greenpeace Nederland and PAN Europe v. Commission, ECLI:EU:T:2018:817, published in the electronic Reports of the cases, parr. 20-26. 25 January 2017, T-512/09 RENV, Rusai Armenal v. Council, ECLI:EU:T:2017:26, published in the electronic Reports of the cases, par. 28. 15 December 2016, T-169/08 RENV, DEI v. Commission, ECLI:EU:T:2016:733, published in the electronic Reports of the cases, par. 50. 2 July 2015, joined cases T-425/04 RENV and T-444/04 RENV, France and Orange v. Commission, ECLI:EU:T:2015:450, published in the electronic Reports of the cases. 14 April 2015, T-527/09 RENV, Ayadi v. Commission, ECLI:EU:T:2015:205, non published, par. 28

The lack of clarifications concerns the status of Art. 217 of the rules of procedure of the General Court, which refer expressly to the right to submit observations in the parts of the first instance trial, which are placed in a deliberate way in the court order of 16 June 2020.<sup>83</sup> From a procedural point of view, the decision originates a small meaning.

The court in 2017 rejected the appeal of the University of Wrocław as inadmissible, based on the fact that the counsel representing it was not employed by a research centre of the Faculty of Law at this university and therefore did not meet the requirements of Art. 19, par. 3 and 4 of the Statute of the CJEU, as well as Art. 51, par. 1 of the rules of procedure of the General Court. The relevant order was challenged separately by the relevant university in the Republic of Poland.

The interventions *ad adiuvandum* in the Czech Republic and the Krajowa Izba Radców Prawnych (National Chamber of Legal Advisers of Poland) were admitted before the CJEU.<sup>84</sup> A ruling was issued on 4 February 2020 with the Grand Chamber of the CJEU annulling the court order and referring the case back to the court for consideration on merit.<sup>85</sup>

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<sup>83</sup>Tribunal, order of 16 June 2020, T-137/16 RENV, *Uniwersytet Wrocławski v. REA*, ECLI:EU:T:2020:275, non published, par. 19.

<sup>84</sup>CJEU, order of 5 July 2018, joined cases C-515/17 P and C-561/17 P, *Uniwersytet Wrocławski and Poland v. REA*, ECLI:EU:C:2018:553, non published. Order of 27 February 2019, joined cases C-515/17 P and C-561/17 P, *Uniwersytet Wrocławski and Poland v. REA*, ECLI:EU:C:2019:174, non published. 5 July 2018, *Uniwersytet Wrocławski and Poland v. REA*, op. cit., par. 6.

<sup>85</sup>CJEU, 4 February 2020, joined cases C-515/17 P and C-561/17 P,

After the annulment and before the referral case was registered, it invited the main parties in the initial case as well as the appellant and the two interveners in the appeal to submit written observations on the conclusions drawn from the judgment of the CJEU for the resolution of the related dispute.

The three parties addressed took a position. Only Poland stated that it wanted to abandon the proceedings, which followed the referral, maintaining the conclusions relating to costs in the appeal proceedings initiated before the CJEU.

Art. 217, par. 1 of the Rules of Procedure of the General Court summed up the case by stating that a Member State which challenged its own decision, according to Art. 56, par. 3 of the Statute of the Rules of Procedure of the General Court, allowed the parties to intervene in the appeal, according to Art. 131 of the Rules of Procedure of the General Court, without considering the lack of provisions which are expressed as parties to the proceedings. This position was reaffirmed by Art. 217 of the Rules of Procedure of the General Court.

This is a self-defense position considering that the letters sent *motu proprio* in the registry to the Republic of Poland, the Czech Republic and to the Polish National Chamber of Legal Advisers are ineffective. They cannot recognize the subjects in

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Uniwersytet Wrocławski and Poland v. REA, ECLI:EU:C:2020:73, published in the electronic Reports of the cases.



this capacity, i.e. as an intervening party, according to Art. 144 of the rules of procedure of the General Court, and within the scope of referral proceedings, as a party to the proceedings, according to Art. 217, par. 1 of the rules of procedure of the General Court. In this regard, it is recalled, Art. 219 of the rules of procedure of the General Court which highlighted the costs relating to appeal proceedings at the CJEU.

The costs relating to the parties, during the proceedings are applied to, the initiated proceedings as well as to the referral appeal proceedings. It is not applicable for the parties, who are not admitted to intervene at the CJEU and for the appeal the parties who are not admitted to the initial trial. According to Art. 184, par. 3 of the rules of procedure of the General Court the request formulated by a Member State does not find a basis in the quality of parties and thus the jurisdiction, for the costs incurred by the interveners in the appeal, is concluded.

This is a restrictive interpretation<sup>86</sup> and a response to the exception raised by the European Commission itself.<sup>87</sup> In a preliminary way such cases are presented as pilot cases in a context in which the companies are not heard as interveners before the General Court but have acquired the status of the

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<sup>86</sup>Tribunal, 23 September 2020, joined cases T-515/13 RENV and T-719/13 RENV, Spain and others v. Commission, ECLI:EU:T:2020:434, published in the electronic reports of the cases, par. 62-65.

<sup>87</sup>Tribunal, 23 March 1993, T-43/89, Gill v. Commission, ECLI:EU:T:1993:24. 2 September 2014, T-203/10 RENV, Stichting Woonpunt and others v. Commission, ECLI:EU:T:2014:792, non published, par. 47.

appeal proceedings through the initial judgment.<sup>88</sup>

The General Court has been based on the principle of good administration of justice, recognising in a similar manner the status of the referral proceedings with the aim of ensuring adequate treatment to a dispute pending before it and thus also promoting the continuity of the adversarial proceedings in other cases, which concern the same decision that seems to be suspended.

This is an interpretation based on Art. 217, par. 1 of the rules of procedure of the General Court which states the: “parties to the proceedings before (it)”, as a provision which does not exclude the interveners in the appeal proceedings who can ipso facto acquire the quality within the scope of the referral proceedings.

### **Regulation of procedures of the General Court and gaps covered by case law solutions from the CJEU**

The case law as a result of a gap in the law has guided the relative remedy to the section of the CJEU with the twin orders of 1st August (Rigaux, 2010),<sup>89</sup> as a starting point for the

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<sup>88</sup>CJEU, order of 21 December 2016, C-128/16 P, Commission v. Spain and others, ECLI:EU:C:2016:1006, non published. C-128/16 P, Commission v. Spain and others, ECLI:EU:C:2016:1007, non published.

<sup>89</sup>CJEU, order of 1st August 2022, C-31/22 P(I), Atlas Copco Airpower and Atlas Copco v. Commission, ECLI:EU:C:2022:620, published in the electronic Reports of the cases. 1st October 2022, C-32/22 P(I), Anheuser-Busch Inbev and Ampar v. Commission, ECLI:EU:C:2022:621. 1st August 2022, C-74/22 P(I), Soudal and Esko-Graphics v. Magnetrol and Commission, ECLI:EU:C:2022:632, published in the electronic reports of the cases.

conclusions of the Advocate General Szpunar.<sup>90</sup> These cases were attributed to the large section, thus conferring the solution adopted with a necessary way in a future direction and to orientations, that make legal certainty superfluous. In such a way, a regulatory intervention aimed at adapting the rules of procedure of the General Court.

The object of appeal before the CJEU are the decisions of the president of the section that invests the referral case after a reading by the registrar without paying the observations on conclusions that draw judgments to the CJEU and presenting spontaneously the parties that intervene in the appeal.<sup>91</sup>

It was the Advocate General, who took positions in relation to cases<sup>92</sup>, raising questions about the persistence of the status of intervener, admitting, however, the proceedings that follow the referral in the appeal stage. In such a way, the CJEU has assumed the opportunity to make a relative pronouncement on the rules of admissibility of appeals against decisions that reject the request for intervention.<sup>93</sup>

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<sup>90</sup>CJEU, Conclusions of the Advocate General Szpunar, 14 July 2022, C-31/22 P(I), C-32/22 P(I) and C-74/22 P(I), *Atlas Copco Airpower and Atlas Copco v. Commission, Anheuser-Busch Inbev and Ampar/Commission and Soudal and Esko-Graphics v. Commission*, ECLI:EU:C:2022:575, published in the electronic Reports.

<sup>91</sup>CJEU, 16 September 2021, C-337/19 P, *Commission v. Belgium and Magnetrol International*, ECLI:EU:C:2021:741, published in the electronic Reports of the cases.

<sup>92</sup>CJEU, conclusions of the advocate general Szpunar, 14 July 2022, joined cases C-31/22 P(I), C-32/22 P(I) and C-74/22 P(I), *Atlas Copco Airpower and Atlas Copco v. Commission, Anheuser-Busch Inbev and Ampar/Commission and Soudal and Esko-Graphics v. Commission*, op. cit., par. 1.

<sup>93</sup>Tribunal, 29 July 2019, C-654/17 P, *Bayerische Motoren Werke and Freistaat*

The procedural case originates from long and complex orders arising from the annulment of the decision of the European Commission. It holds that these exemptions are granted by Belgium constituting an aid scheme, that is incompatible with the internal market, which ordered the related recovery as a proposed appeal.

Belgium and Magnetrol International<sup>94</sup> are, therefore, identified as pilot cases. The appeal judgment, which was proposed by the European Commission, is contrary to the first instance judgment and to cases of companies, that are suspended and await the outcome of the pilot cases.<sup>95</sup>

The CJEU has annulled this judgment in 2021, referring the case *ex novo*.<sup>96</sup> The solution to the referred case, for the companies that intervened in the appeal, presented observations on conclusions that draw the judgment of the CJEU as rejected by the registry without the documents delivered.

These interventions in the appeal assumed the correction of the error proposed through a letter to the registry and by a denial,

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Sachsen v. Commission, ECLI:EU:C:2019:634, published in the electronic Reports of the cases, parr. 24-56.

<sup>94</sup>Tribunal, 14 February 2019, T-131/16 and T-263/16, Belgium and Magnetrol International v. Commission, ECLI:EU:T:2019:91, published in the electronic Reports of the cases.

<sup>95</sup>CJEU, order of 15 October 2019, C-337/19 P, Commission v. Belgium and Magnetrol International, ECLI:EU:C:2019:909, non published.

<sup>96</sup>CJEU, 16 September 2021, C-337/19 P, Commission v. Belgium and Magnetrol International, ECLI:EU:C:2021:741, published in the electronic Reports of the cases.

which was implicit in the recognition of the status of interveners in the referral proceedings.

The orders of the CJEU respond to important procedural issues. Thus, the exceptions that arose from the European Commission are rejected. The CJEU admits the admissibility of appeals, according to Art. 57, par. 1 of the Statute of the CJEU, and judges the decision directly even though the form followed is new and attributable to the referral proceedings.<sup>97</sup>

A third party is not allowed to intervene in the appeal, which seeks to fully benefit from the right to intervener status in the referral proceedings. This is a formal proposal to an application for intervention before the objective of being able to appeal according to the provision of the rejection decision, which does not seek to deprive any jurisdictional protection of procedural rights, according to Art. 40 of the Statute of the CJEU.<sup>98</sup>

The most important aspect for the cases in question is addressed by the CJEU. It is controversial to the regime of intervention, concerns the parties, who are admitted to intervene in the context of a well-founded appeal, thus annulling the decision that refers the case until a final decision is made.<sup>99</sup> In this case, the argument is refuted by the European Commission on the

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<sup>97</sup>CJEU, 1st August 2022, C-31/22 P(I), *Atlas Copco Airpower and Atlas Copco v. Commission*, ECLI:EU:C:2022:620, par. 30-57.

<sup>98</sup>CJEU, 1st August 2022, *Atlas Copco Airpower and Atlas Copco v. Commission*, op. cit., par. 95.

<sup>99</sup>CJEU, CJEU, 1<sup>st</sup> August 2022, *Atlas Copco Airpower and Atlas Copco v. Commission*, op. cit., par. 69-71.

basis of a literal interpretation of the rules of procedure of the General Court.

The new examination of the first-instance appeal follows the annulment judgment by following the relevant appeal procedure that originated. The parties admitted to intervene before the CJEU have demonstrated their interest, according to Art. 40 of the Statute of the CJEU, in the resolution of the dispute submitted in exceptional cases.

There is also the reference to questions, that must be decided within the procedure, that follows the referral.<sup>100</sup> It is an interest that cannot be different according to the CJEU. It, therefore, decides to definitively create the case, that has constituted the object of the appeal by referring the examination to the judgment.

Nothing is excluded with regard to the possibility of a new appeal before the CJEU, which has as its object the decision taken, according to the outcome of the referral procedure.<sup>101</sup> A procedure in which the parties intervening in the appeal have

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<sup>100</sup>CJEU, Conclusions of the Advocate General Szpunar, 14 July 2022, joined cases C-31/22 P(I), C-32/22 P(I) and C-74/22 P(I), *Atlas Copco Airpower and Atlas Copco v. Commission, Anheuser-Busch Inbev and Ampar v. Commission and Soudal and Esko-Graphics v. Commission*, op. cit., par. 74. order of 22 October 2019, C-173/19 P, *Scandlines Danmark and Scandlines Deutschland v. Commission*, ECLI:EU:C:2019:907, non published, par. 15.

<sup>101</sup>CJEU, 2 February 2023, joined cases C-649/20 P, C-658/20 P and C-662/20 P, *Spain and others v. Commission*, ECLI:EU:C:2023:60, published in the electronic Reports of the cases. Tribunal, 23 September 2020, joined cases T-515/13 RENV and T-719/13 RENV, *Spain and others v. Commission*, ECLI:EU:T:2020:434, published in the electronic reports of the cases.

strengthened their status, which undermines the continuity of the adversarial proceedings before the judges of the Union by making participation in the same intermittent dispute.<sup>102</sup>

Another issue concerns the costs regime. The CJEU considers paradoxical to rule on the costs related in the appeal phase, according to Art. 219 of the rules of procedure of the General Court, without the parties admitting to intervene in the phase that are expressed.<sup>103</sup> In this way, the CJEU has accepted the related appeals and has annulled the contested decision.

This is an approach that has confirmed the appeal judgment.<sup>104</sup>

The CJEU has rejected the inadmissibility that arises from the European Commission against the appellants, who have held the status of interveners within the judgment of the referral only because they have acquired such a status within the scope of an appeal judgment.

It is the European Commission that has affirmed the violation of Art. 217 of the rules of procedure of the General Court as an error of law given, which has recognized the quality of intervening parties to subjects, who have not asked to intervene in the relevant first instance judgment. This provision limits the parties entitled to file other briefs and observations within the

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<sup>102</sup>CJEU, 1st August 2022, *Atlas Copco Airpower and Atlas Copco v. Commission*, op. cit., par. 84.

<sup>103</sup>CJEU, 1st August 2022, *Atlas Copco Airpower and Atlas Copco v. Commission*, op. cit., parr. 85-90.

<sup>104</sup>CJEU, 2 February 2023, *joined cases C-649/20 P C-658/20 P and C-662/20 P, Spain and others v. Commission*, op. cit., parr. 20-26.

scope of referral.

According to the orders of 2022<sup>105</sup> the CJEU reiterated, that according to Art. 40 of the Statute of the CJEU, procedural rights are guaranteed to the intervening parties of the rules of procedure of the General Court since the principle of good administration of justice imposes the prospect of a coherent articulation for the processes of two jurisdictional instances of the Union.

In such a way, it is promoted the continuity of the contentious debate as an intervening party in the appeal before the CJEU, which benefits *ipso iure* the same status within the scope of the referral proceedings.<sup>106</sup> The recognition of this status confers the quality of parties to the legitimate undertakings, according to Art. 56, par. 2 of the Statute of the CJEU<sup>107</sup> as well as appealing the judgment that directly concerns them.<sup>108</sup>

The party admitted to intervene in the appeal retains the status of the subsequent referral proceeding within the logic that considers the procedural matter in a unitary and dynamic context, assuming for the appellant the principal title with

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<sup>105</sup>CJEU, order of 1st August 2022, C-74/22-P (I), Soudal and Esko-Graphics v. Magnetrol and Commission, ECLI:EU:C:2022:632, published in the electronic Reports of the cases, par. 124.

<sup>106</sup>CJEU, 2 February 2023, joined cases C-649/20 P C-658/20 P and C-662/20 P, Spain and others v. Commission, op. cit., par. 23. 1st August 2022, Atlas Copco Airpower and Atlas Copco v. Commission, op. cit., par. 96.

<sup>107</sup>Art. 56, lett. b of the Statute.

<sup>108</sup>CJEU, 2 February 2023, joined cases C-649/20 P C-658/20 P and C-662/20 P, Spain and others v. Commission, op. cit., parr. 25-26.



respect to the decision taken and according to the outcome of the relevant proceeding.

### **Some effects in practice**

The Grand Chamber of the CJEU has followed a definitive solution, that removes any doubt regarding the status of the intervener for the appeal to a referral judgment, creating thus difficulties that respect the practice of the latter. This is how the confidentiality that overturns the interveners, who are admitted in the appeal.<sup>109</sup>

A partial discussion of the mechanism of the pilot cases disposes in theory a risk of deviation of the procedure when the appeal intervention is aimed exclusively at access to the file before their application.

Other solutions can also be configured. A first path emphasizes the interpretation of Art. 217 of the rules of procedure of the General Court. It is consistent with that of the jurisprudence of the CJEU without resorting to a relative modification. Any issues that are pertinent with the confidentiality concern the observations related to the consequences drawn from the decision of the CJEU to the intervener and to the appeal stage, that recognizes the same status in a unique way and with reference to the cause of referral. These issues are also avoided

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<sup>109</sup>Tribunal, order of 15 January 2021, T-719/13 RENV, Lico Leasing et Pequeños y Medianos Astilleros Sociedad de Reconversión v. Commission, ECLI:EU:C:2021:12 published in the electronic Reports of the cases.

and limited. Consequently, access to the file is limited only in the RENV case.<sup>110</sup>

This solution does not affect the rights of interested third parties. Therefore, it asserts their rights to arguments arising from Art. 47 CFREU<sup>111</sup> when exercising and fulfilling the scope of referral.<sup>112</sup> Another path concerns the modification of Art. 217, par. 1 of rules of procedure of the General Court, which annuls the intervener after the closure in the written phase.

The parties to the proceedings before the CJEU may file their written observations on conclusions that are drawn from the decision of annulment with referral by the other as well as by the Member State and/or the institution the proposed appeal, according to Art. 56, par. 3 of the Statute of the CJEU as well as of the admitted parties, who can intervene only in the appeal phase since they do not have access to the relevant first-instance file.

This solution seems to prefer the measure, that codifies the orientation of the CJEU. It clarifies, also, the procedural rights of the intervener, foreseeing any possible conflict between the parties.

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<sup>110</sup>Art. 217, par. 1, Rules of Procedure of Tribunal.

<sup>111</sup>CJEU, order of 10 September 2019, C-597/18 P, Council v. K. Chrysostomides & Co. and others, op. cit., par. 18.

<sup>112</sup>Art. 56, par. 3 of the Statute.

**Concluding remarks**

The procedure, which includes in a heterogeneous way the functions for the CJEU and of the General Court, is called to exercise the jurisdictional system of the Union that has prevented and has continued to prevent the use of institutes, which organically develop the national procedural systems, as well as the intervention of third parties in direct appeals. It is true that the interest of third parties to intervene inevitably takes on a precise physiognomy to each type of procedural action.

The lack of a vision, that adapts the institution of intervention in a plastic way to the multifaceted needs of a process before the jurisdictional bodies of the Union, is connected with the protection of the private parties interested in intervening in cases and in emergencies, which quickly increase the process and the interests of the main parties despite the fact that the issue of confidentiality arises.

This perspective seems very “difficult” from a practical point of view. In practice, it conditions the completion of interventions by private parties especially within the scope of an economic dispute. This is a dispute that prevents the increase of a process to an adequate investigative support revealing how useful should be a dispute with evaluation objectives on different issues. Therefore, there is a risk of an analysis, that excessively

weakens the right to effective judicial protection, established by Art. 47 CFREU. This is applicable towards interested third parties, who take part in the process.<sup>113</sup>

It is also expected to start a reflection on a regulatory discipline of intervention open to third parties without underestimating the dynamics of a real pragmatism of the CJEU connected with a monocratic composition to the person of the president and/or vice-president, as it has shown in all these years in addressing the discipline of intervention taken into consideration.

The CJEU continues to play an energetic role in the sector that favors the opening to third parties in the perspective of *de iure condendo*, also restricting from Art. 40, par. 2 of the Statute of the CJEU, as noted through the previous paragraphs. The related changes in recent years to the procedural regulations of the General Court have favored the speed and the workload of the cases.

Above all, this happened after the last reform of 2024 on the passage of the preliminary reference from CJEU to the General Court without precise rules on the intervention of third parties. From a technical point of view, this mechanism flows into the main process even though the intervention of the process is not denied. It is evident that this aspect is problematic thus imposing requests for confidentiality that have effects that weigh on the

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<sup>113</sup>CJEU, Conclusions of the Advocate General Sharpston, 6 December 2007, joined cases C-341/06 P and C-342/06 P, *Chronopost v. UFEX and others*, ECLI:EU:C:2007:758, I-04777, par. 46.

own process.

The related issues have to do with confidentiality matters concerning a smaller percentage of the processes after the request for treatment, that reserves and contests without eliminating and obscuring the importance of a participation of the interested third parties in the outcome of their process.

Solutions are thus found for the reduction to a minimum of conflicts in matters of confidentiality, that identify at a jurisprudential level, the relative application of a rigorous nature, that is consistent with the criterion of interest and the solution of the disputes.<sup>114</sup>

We can also think of the relative requests for intervention for the causes that are related to direct appeals against the decisions of the European Commission that have to do with unlawful acts in the competition sector and the related fines. As the only objective is the establishment of the behavior on the part of the appellant that thus creates an infringement of the relevant rules for competition and a fine imposed on it.

The Court of Justice has not taken a position on the analysis of the European Commission on a dispute of a compensatory nature and on the causes for the companies that have invested the role of complainants before the European Commission.

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<sup>114</sup>Tribunal, 7 December 2018, T-612/17, Google and Alphabet v. Commission, ECLI:EU:T:2018:1001, non published, par. 14 and 15. 17 December 2018, T- 612/17, Google and Alphabet v. Commission, ECLI:EU:T:2018:1005, non published, parr. 20 and 21.

These are participants in a process as intervenors and opponendum. In reality, there are many of these subjects and the process becomes complicated and difficult in an inevitable way to the relative development of requests for confidential treatment of the file, which thus brings an added value of a limited nature to the procedural level.

The jurisprudential approach seems to be rigorous and so the right is limited to intervene only in partem able to demonstrate a sufficient interest in the resolution of disputes and the evaluation of a character of the behavior of a company for a sanction imposed on it and to an act that has a general nature especially at a compensatory level.

In sum, such a procedure it allows its own process to the parties, who are interested, through the simplification and management of confidentiality conflicts. This happens through the adoption of organizational measures of the procedure at a regulatory level, which recognizes all the provisions that are pertinent in the matter. It, finally, regulates in a distinct way the type of process and the different forms of intervention especially of third parties.

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